**Flannery Motors, Inc. *and* Bruce Carland.** Case 7–CA–37280

March 22, 2000

## SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

On July 30, 1999, Administrative Law Judge Richard H. Beddow Jr. issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and to adopt the recommended Order, as modified below.

The issue in this case is the correct amount of backpay due discriminatee Scott McClellan. Having previously found, inter alia, that the Respondent unlawfully discharged McClellan, in his supplemental decision the judge ordered the Respondent to remit backpay to McClellan in the amount of $98,704.24 plus interest, minus tax withholdings required by law.[1]

The General Counsel has filed a limited exception requesting a recalculation of the gross and net backpay due McClellan. He avers that the judge's supplemental decision inadvertently stated the gross and net backpay due McClellan for the fourth quarter of 1994 as $5,251.36. He further avers that the parties have jointly calculated, and agree, that the correct gross and net backpay amount for McClellan for that quarter is $3,080.62. Thus, the corrected net backpay amount due McClellan for the entire backpay period is $96,533.50. Counsel for the discriminatees and for the Respondent do not oppose the General Counsel's exception.

Accordingly, we grant the General Counsel's limited exception.

### ORDER

It is ordered that the Respondent, Flannery Motors, Inc., Waterford, Michigan, its officers, agents, successors, and assigns, shall make whole each of the discriminatees by payment to each of them as follows: Bruce Carland, $69,114.65 and Scott McClellan, $96,533.50, plus interest in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus required tax withholdings.

*Erikson C. N. Karmol, Esq.,* for the General Counsel.
*Patrick Ennis* and *Lawrence F. Raniszeski, Esqs*., for the Respondent.
*Edward R. Ptasnik, Esq.,* of Sterling Heights, Michigan, for the Discriminatee.

## SUPPLEMENTAL DECISION

### STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Detroit, Michigan, on February 22 and 23, and April 12, 1999. Subsequent to an extension in the filing date briefs were filed by each party.[1]

This proceeding is based upon backpay specification dated August 27, 1998, enforcing the backpay provisions of the Board's Decision and Order dated August 19, 1996, 321 NLRB 931, which in turn was enforced by the 6th Circuit Court of Appeals on November 6, 1997. This Order requires the Respondent to make whole discriminatees Bruce Carland and Scott McClellan for their loss of earnings and benefits resulting from Respondent's unfair labor practices in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

Upon review of the backpay specification, the Respondent's answer, the evidence stipulated to or presented at the hearing, and the respective briefs, it appears that the primary issues are whether the discriminatees failed to mitigate damages by not making an adequate search for work or by being underemployed, whether they concealed interim employment and income and the reasonableness of the method of calculating backpay utilized by the General Counsel.

### Factual Background

Respondent is a automobile dealership located in Waterford, Michigan, engaged in selling and repairing new and used Ford automobile. Waterford is in Oakland County in the so-called tricounty Detroit area (which also includes Michigan and Wayne Counties), which has 31 Ford dealers, 18 Lincoln-Mercury dealers, and approximately 215 new car dealers. Discriminatee Bruce Carland began working for the Respondent in 1988 as a light car technician (mechanic) and his last position was a used car technician. Discriminatee Scott McClellan started working for the Respondent in 1989 as a transmission technician. Both were paid on a flat rate. The discriminatees were illegally discharged on December 1 and 28, 1994, respectively, because they supported a union and engaged in protected concerted activities.

After his discharge, Carland applied for unemployment compensation on January 3, 1995, and collected $7618 in unemployment compensation from January through July (all of his available unemployment benefits) and did not find a job. He searched for a job during this period by looking through the Oakland Press Newspaper, filling out applications, and looking for help wanted signs, however, Carland could not identify any specific places of employment at which he applied or sought employment. His state mechanic certificate expired on June 16 and was not renewed until August 25. Job search expenses submitted by Carland were specifically identified by Carland for the period of June through August 1995, and May through July 1996, without any receipts or other documentation. Carland did not submit any expenses for the other periods he was unemployed (January through May 1995 and the end of 1996 through 1997).

[1] 321 NLRB 931 (1996), enfd. 129 F.3d 1263 (6th Cir. 1997). The judge also awarded backpay to discriminatee Bruce Carland. There were no exceptions to the backpay Order as it applies to Carland.

[1] A joint motion to correct transcript filed by the General Counsel and the Respondent is granted and made part of the record as Jt. Exh. 1.

Schedule C of Carland's compliance specifications, as amended (see G.C. Exh. 7),[2] reflect the following employment and earnings during the backpay period:

| *Yr./Qtr.* | *Name & Address of Interim Employer* | *Quarterly Earnings* |
|---|---|---|
| 95/01 | | |
| 95/02 | Automobile Service of Bloomfield, Inc., 3075 Orchard Lake Road, Keego Harbor, MI 48320–1246 ASB | $ 1,661.54 |
| 95/03 | Golling Chrysler Plymouth, Inc. 90 S. Telegraph Road, Waterford, MI 48328–3863Workers | 5,420.90 |
| 95/04 | Compensation payments, Michigan Department of Labor | |
| 96/01 | Golling Chrysler Plymouth, Inc. | 6,209.22 |
| | Golling Chrysler Plymouth, Inc. | 2,865.80 |
| 96/02 | Complete Auto Repair & Service, Inc., 9640 Highland Road, White Lake, MI 48386–2316 (CARS) | 5,927.01 |
| 96/03 | Tim's Auto Repair, Inc. 6565 Cooley Lake Road, Waterford, MI 48327–4267 CARS | 802.50 |
| 96/04 | | |
| 97/01 | | |
| 97/02 | | |
| 97/03 | | |
| 97/04 | | |
| 98/01 | | |

The amended schedule E for Carland reflect an alleged total gross backpay for 14 quarters of $137,770.91, interim earnings of $22,886.97, expenses of $3,165.83, and a total net of $118,049.77.

At the time McClellan was terminated, he had almost 20 years of experience as a mechanic. He was certified in three categories, but McClellan acknowledges that his certifications were expired for almost 24 months during the backpay period. He also had an estimated $8600 in tools that he left at Flannery Ford until May 1995. Records show that he applied for unemployment compensation on January 3, 1995 (the records indicate that McClellan sought to receive compensation for December 1994, by virtue of a late filing, but it was determined there was no good reason for his failure to file and he was ruled ineligible through December 31, 1994. McClellan collected $6,006.50 in unemployment compensation from January through May 27, 1995 (20.5 weeks)).

For the period from December 1994 through June 1995, while receiving his available unemployment compensation, McClellan did not find a job. McClellan's job search during this period entailed looking through the Detroit News Newspaper and filling out applications. During the period December through March 1995, he identified six dealerships where he may have applied or sought employment, but he could not recall anyone to whom he spoke. McClellan did not submit any job search or other expenses.

[2] The amendment to both specifications was received at the resumption of the hearing on April 12, 1999, and is, based in part, on the record in the first 2 days of hearing and this court's request that the figures be set forth on a quarterly basis.

Schedule H of McClellan's compliance specifications, as amended (see G.C. Exh. 7) reflects the following employment and earnings during the alleged backpay period:

| *Yr./Qtr.* | *Name & Address of Interim Employer* | *Quarterly Earnings* |
|---|---|---|
| 95/01 | Stewlay, Inc. 3118 W. Huron, Waterford, MI 48328–3625 | $ 757.26 |
| 95/02 | Stewlay, Inc. | 4,922.25 |
| 95/03 | Stewlay, Inc. | 4,922.25 |
| 95/04 | Stewlay, Inc. RR & R, Inc., USA Transmission 4220 N. Woodward, Royal Oak, MI 48073–6300 | 1,754.95 |
| 96/01 | RR & R, Inc. | 2,910.87 |
| 96/02 | RR & R, Inc | 1,119.57 |
| 96/03 | | |
| 96/04 | DK's Repairs 1516 Springwells, Detroit, MI 48209 | 4,250.00 |
| 97/01 | DK's Repairs | 4,250.00 |
| 97/02 | DK's Repairs | 4,250.00 |
| 97/03 | DK's Repairs | 4,250.00 |
| 97/04 | | |
| 98/01 | DK's Repairs | 613.46 |

Amended schedule I for McClellan reflects an alleged total gross backpay for 14 quarters of $229,774.40, interim earnings of $34,000.61, and a total net backpay of $195,773.79.

## Discussion

It is well established that the only burden on the General Counsel in a backpay proceeding is to show the gross amount of backpay due, and that the finding of an unfair labor practice presumes that some backpay is owed, see *Hacienda Hotel & Casino,* 279 NLRB 601 (1986).

Here, the Respondent challenges the General Counsel's backpay computation formula, it otherwise questions the discriminatees' availability for work or reasonable efforts to find work and it contends that the backpay period should toll as of the December 24, 1997, the date of the letters sent offering reinstatement.

In its answer the Respondent neither admitted or denied Carland's expense claims (McClellan made no claim). As pointed out by the General Counsel it is well settled that a discriminatee is entitled to expenses incurred in seeking or maintaining interim employment and that such expenses are deducted from interim earnings in the appropriate calendar quarters and that a discriminatee must be made whole for the expenses he incurred due to his loss of medical insurance resulting from Respondent's unlawful action (citations omitted). The General Counsel's medical figures are shown to be based upon a review of Carland's bill and premiums. The only evidence bearing on this issue provided by the Respondent was the testimony of owner Foreman, who asserted that Respondent only paid 50 percent of the insurance premiums for the discriminatees in 1994. Carland would not have had to seek outside insurance as an individual but for Respondent's unlawful termination of him

and, accordingly, I find that to the extent the evidence adequately supports the backpay specifications pertaining to search for work and medical expenses during those quarters, the expense figures are not persuasively refuted by the Respondent, and I find that such expenses properly are reimbursable. No expenses are justified however, for 1997, inasmuch as the record otherwise shows that Carland did not make a reasonable effort to find work or to mitigate damages after December 1996.

*A. Tolling of the Backpay Period*

The Respondent contends that the backpay obligation should be tolled by its letters dated and sent December 24, 1997, to the discrimnatees. However, the Respondent's own letters set January 16 as the outside date for a response. The Respondent asserts that it is somehow arbitrary and unreasonable for the Board to now use the response date it suggested, however, an employer must allow the employee a reasonable time in which to respond and make arrangements to begin work. *Cliffstar Transportation Co.,* 311 NLRB 152, 155, 159 (1993), and it may not impose onerous or unreasonable conditions on employment of the reinstated employee. A reinstatement offer that otherwise is facially valid preserves the ongoing entitlement to backpay and tolls the obligation only when that date is reached or when an earlier return to work occurs, see *Krist Oil Co.,* 328 NLRB 825 (1999), and *Florida Steel Corp.,* 273 NLRB 889, 917 (1984).

Here, in view of the fact that the period included Christmas' and New Years' holidays, I find that the notice period to be reasonable and I find that both backpay periods toll me on January 16, 1998.

*B. Mitigation*

As stated by the Board in *Fabi Fashions*, 291 NLRB 586, 587 (1988):

> A discriminatee is required to make a reasonable search for work in order to mitigate loss of income and the amount of backpay. *Lizdale Knitting Mills*, 232 NLRB 592, 599 (1977). The Board and the courts hold however, that in seeking to mitigate loss of income a backpay claimant is "held . . . only to reasonable exertions in this regard, not the highest standard of diligence . . . . The principle of mitigation of damages does not require success, it only requires an honest good faith effort . . . ." *NLRB v. Arduini Mfg. Co.,* 394 F.2d 420, 422–423 (1st Cir. 1968); *NLRB v. Madison Courier*, 472 F.2d 1307 (D.C. Cir. 1972). The Board and the courts also hold that the burden of proof is on the employer to show that the employee claimant failed to make such reasonable search. *NLRB v. Midwest Hanger Co.*, 550 F.2d 1101 (8th Cir. 1977), or that he willfully incurred losses of income or was otherwise unavailable for work during the backpay period. *NLRB v. Pugh & Barr, Inc.,* 231 F.2d 588 (4th Cir. 1956); *NLRB v. Miami Coca Cola Bottling Co.,* 360 F.2d 569 (5th Cir. 1966). Moreover, in applying these standards, all doubts should be resolved in favor of the claimant rather than the respondent wrongdoer. *United Aircraft Corp.,* 204 NLRB 1068 (1973).

What constitutes a good-faith search for work depends on the facts of each case. In this regard the Board stated:

> [T]hat in broad terms a good-faith effort requires conduct consistent with an inclination to work and to be self-supporting and that such inclination is best evidenced not by a purely mechanical examination of the number or kind of applications for work which have been made, but rather by the sincerity and reasonableness of the efforts made by an individual in his circumstances to relieve his unemployment. Circumstances include the economic climate in which the individual operates, his skill and qualifications, his age, and his personal limitations. [Id.]

In *Madison Courier, Inc.,* supra, the court also stated at page 1318, that:

> [I]n order to be entitled to back pay, an employee must at least make reasonable efforts to find new employment which is substantially equivalent to the position [which he was discriminatorily deprived of] and which is suitable to a person of his background and experience.

Here, both discriminatees sought substantially equivalent mechanic positions, and I find that the interim employment they obtained, generally in small, nondealership repair facilities, constituted a legitimate course of interim employment in comparable work. Otherwise, they had no duty to search for jobs at dealership repair facilities or for potentially more lucractive employment, see *Colders Furniture*, 307 NLRB 1442 (1992).

After being terminated, both Carland and McClellan initially received essentially their full entitlement of unemployment compensation benefits. Both, however, testified as to specific efforts to obtain work (at Ford or Lincoln Mercury dealerships in McClellan's case looking at newspaper ads and unidentified job applications for Carland). Otherwise, it appears that it is a condition for the continued receipt of unemployment benefits that claimants search for employment. Accordingly, the approved receipt of benefits is a prima facia showing that the discriminatees met the State's job search requirements and it is inconsistent with the employers contention that receipt of unemployment benefits somehow constitutes evidence of willful avoidance of employment.

The Respondent presented unemployment statistics for Michigan, Oakland, and Wayne County, which showed a steady long-term decline in the unemployment rate during the backpay period in these areas. A vocational expert hired by the Respondent prepared a report covering the backpay period which concluded that there was no reason for any period of unemployment for a mechanic, as the job market tended towards above average growth. He surveyed the Sunday editions of the local papers, the Detroit News/Free Press, during the backpay period and found numerous positions suiting the claimant's qualifications and certifications. The Respondent also presented volumes of auto mechanic ads from the sources the claimants asserted they reviewed for jobs and a representative sample of those were admitted into the record as Respondent's Exhibit 50. As noted above it also was established that in the tricounty Detroit area there are 31 Ford dealers, 18 Lincoln-Mercury dealers, approximately 215 new car dealers, and that there are numerous other automotive repair facilities.

A dealership consultant specializing in warranty repair claims who works with dealership service departments observed an abundance of available employment during the backpay period. He stated that there has been a need for technicians throughout the backpay period, that technician positions had been hard to fill, that dealerships had not been able to find enough qualified technicians and that there is competition for mechanics from multiple sources and industries. Billington, the

owner of CARS, Inc., testified that if a mechanic wanted work, there was a job out there. Respondent's service manager, Rick Castanos, testified that in the past 5 years the job market for technicians has been "very good" and there are "lots of jobs." Owner Foreman stated that the demand for mechanics has exceeded the supply during the past 4–5 years.

Carland's job search first success was a mechanic's job at $12 an hour with Automobile Service of Bloomfield, starting on August 28, 1995, and I find that his failure to match his $18.75 flat rate he had at the Respondent is not indicative of willful failure to mitigate losses, see *F. E. Hazard, Ltd.,* 303 NLRB 839 (1991). The Respondent also faults Carland for lying on his job application at Automobile Service by indicating that his departure from the Respondent was because of new ownership rather than confessing he had been fired. Carland's statement was more of an equivocation than a lie and it was indirectly caused by the Respondent's own illegal conduct. Moreover, it was an action taken to help get a job after several months of unsuccessful effort, it was an action that helped to mitigate damages and lessen the Respondent's backpay obligation and it supports rather than damages Carland's claim that he attempted to make a reasonable search for work. Carland was injured and thereafter lost work but he received workers' compensation of $919.42 which was reflected in the Board's revised listing of quarterly earnings. In December 1995, Carland transferred to Golling Chrysler Plymouth at a similar rate of pay but with health benefits. In the second quarter of 1996, he was discharged in a dispute over a timecard punching problem that coincidentally occurred with his receipt and display (to supervisors) of a favorable decision by Adminstrative Law Judge Itkin in the underlying unfair labor practice proceeding in this matter. In the third quarter he secured employment at Complete Auto Repair & Service, Inc. (CARS, Inc.) where he worked until business began to slow (he was paid at a percentage of the flat rate), and he decided to leave in early November 1996.

Carland started working for Tim's Auto Repair, Inc. within a week on November 11, but he left there after working less than 2 weeks because he assertedly was not permitted to take breaks or have a lunch hour. He returned to CARS, Inc., where business picked up, and worked until just before the 1996 Christmas holiday when he asserts that business again died down. This was Carland's last admitted place of employment until he was reinstated with the Respondent. Carland asserts that he continued to actively search for employment as evidenced by his resitation of numerous places where he applied and Carland otherwise explains that he was relying on his girlfriend to support him through this period.

Under these circumstances, I am persuaded that after he was terminated Carland made a reasonable search for work and reasonably mitigated loss of income until the end of 1996. Although the record may raise suspicions that Carland was not aggressive in his efforts, that is not the standard, and I conclude that under the cases and criteria noted above, the Respondent has failed to persuasively show that Carland's efforts in 1995 and 1996 were not reasonable.

A review of the evidence pertaining to the time after 1996, however, warrants a different conclusion. Here, I infer that after the last quarter of 1996 Carland, for whatever reason, either willfully failed to make a reasonable search for work or otherwise concealed employment or worked "off the books" during the remainder of 1997.

Although not conclusive, there is hearsay testimony by the owner of Tims Auto Repair that a new mechanic hired in March told him Carland was working at CARS, Inc. Also, witness Phil Warden, a 12-year mechanic with the Respondent, testified that he ran into Carland in October 1997 and spoke with him briefly. During that conversation, Carland told Warden that he was doing "good" and was working at CARS, Inc. After Carland was reinstated, Warden observed that Carland didn't have his tools and did not seem interested in pulling jobs and working which is necessary to make money when doing flat-rate work.

On rebuttal Carland denied having any chance meeting or conversation with Warden and explained that they did not get along very well with each other at the time of the union campaign. I observed that Warden's testimony was sincere, and straightforward. I find his recall of the chance conversation to be believable and I credit his testimony about this event over Carland's denial.

Despite Carland's claim that he had not worked since prior to Christmas 1997, Carland did not respond to the Respondent's December 24 letter until January 15, and he did not return until approximately February 23, Carland returns to the Respondent with only a small toolbox and worked sporadically, he walked out on March 9, after working only part of the day until and resigned on March 12 and "went back" to work at CARS in March. There is credible evidence that when he briefly returned on March 12, he told Conrad Dean, Respondent's assistant service manager, that his employer gave him some timeoff to "play the game" and gather evidence. Nita Koslowski, Respondent's secretary/treasurer, is responsible for the Employer's record and was involved in the reinstatement of both discriminates, and when Carland spoke with her he said that he was used to making $1000 a week.

Here, the record shows some proof supporting Carland's job search and employment and in applying the usual standards, I have resolved the ambiguities in the discriminatees' favor up until the last quarter of 1996. The Respondent, however, has shown more than just doubts concerning Carland's mitigation efforts in 1997 and based upon his demeanor and testimony I do not believe that he continued to be inclined to work and be self-supporting after he assertly left CARS, Inc., in December and relied on his girlfriend for support.

Here, I am persuaded that Carland, by completely failing to mitigate damages in 1997, combined with circumstantial evidence that he might have hidden continued employment at CARS, Inc., and an absence of specific or persuasive proof of any job search during this period (including a complete absence of job search expenses), has relinquished any prior justification for any continuation of backpay for any quarters beyond the end of 1996.

This conclusion is supported by the Respondent's showing that Carland made only a belated and perfunctory effort to work after his recall by the Respondent. Although I do not give full weight to the opinions of the Respondent's job counseling expert about the relevant job market and the likelihood of success (among other things, he was not familiar with Board precedent relative to factors in a reasonable search), the Respondent has presented sufficient evidence to show that their was an expanding job market for those with Carland's (and McClellan's) skills and this evidence outweighs Carland's unsupported claims that he continued his past job search efforts past the last quarter of 1996. Accordingly, I find that Carland is not shown

to have made a sincere reasonable effort to work and be self-supporting and I conclude that he was willfully idle and failed to mitigate damages after he quit his job in the last quarter of 1996. Accordingly, his backpay period will be ended as of December 1996 (this includes the closure of attendant entitlement to medical insurance expenses claimed for 1997).

As noted, McClellan received unemployment benefits and then successfully obtained a full-time job as a transmission mechanic at Stewlay, Inc. d/b/a Multi-State Transmission in June 1995. This position was an hourly position, paying only $480 a week. But McClellan continued to work while looking for better employment. On January 12, 1996, he was offered employment, with training, at RR & R Inc. d/b/a USA Transmissions he left Stewlay and McClellan testified that RR & R offered to train him on General Motors' and Chrysler's transmissions what he would qualify him for a better job. However, McClellan did not begin until March 4, and he did not gain a fulltime position because he was not familiar with anything other than Ford transmissions and business was not going well. This position was hourly and paid approximately $10 per hour but, on August 4, McClellan left because he was not receiving the training he had been promised and he assertedly began searching for other employment, basically at transmission shops, but he failed to keep any copies of applications he filled out (or any other records).

Despite the probability (endorsed by Respondent's expert, Brad Summers) that transmission technicians are amongst the most highly sought after classification of technicians with a demand that would be over and above the general demand for technicians. McClellan was unemployed until January 1997 when he began fulltime employment with DK Repair where he performed transmissions and brake work for DK Repair. He was paid approximately $8 per hour and worked there until his scheduled reinstatement with Respondent.

Here, the record shows that McClellan made a somewhat underwhelming effort to mitigate damages, however, I find that for the most part he was successful in almost all quarters and the effort was not so poor as to not satisfy the minimal standards of reasonableness. Accordingly, with the exception of one quarter, I conclude that the Respondent has not overcome the presumption in the discriminatee's favor and I find that the record is sufficient to show a partially successful and reasonable effort to find new employment and to mitigate damages. McClellan is shown to have voluntarily quit his job at RR & R Inc. in August 1996, before searching for other employment with a complete failure to mitigate damages for the last quarter of 1996. Although I have credited McClellan's testimony concerning his initial job search effort, I find the Respondent's showing relative to the conditions of the job market for transmission mechanics also to be believable and persuasive and I find McClellan's bland, unsupported assertions that he continued his efforts to be unconvincing and I conclude that McClellan's testimony concerning his search effort in late 1996 is not credible. Under these circumstances, I find that McClellan willfully failed to mitigate damage and failed to make a reasonable search for employment during the last quarter of 1996 and I conclude that the Respondent has shown that it is not responsible for any backpay obligation during that specific quarter, see *Ad Art, Inc.,* 280 NLRB 985 (1986).

### *C. Backpay Formula*

The purpose and objective in selecting a backpay formula is to restore the claimant or make him whole as accurately as possible and the results are not designed to reward a claimant nor to punish the Respondent. Here, the Board's compliance officer calculated the gross backpay of the discriminatee, as reflected in the compliance specification, by comparing the wages earned by Carland during his last year of his employment with the Respondent to the wages earned by six mechanic employees performing similar mechanic duties during Carland's last year adjusted by ratio of Carland's average earnings. With regard to McClellan, the compliance officer determined the average annual wages received each year by mechanic employees performing similar duties as those performed by McClellan during his employment with the Respondent.

In 1994, Carland earned $34,602 during 39 weeks of employment, making his average weekly wages $887.23. Projecting that average weekly wage as if a full year had been worked results in annual wages for 1994 of $46,136. Comparable employees C, D, and E had 1994 earning of $51,774, $56,969, and $45,111, respectively. Employees C and D received somewhat lesser amounts in 1995 and 1996, while E had somewhat greater totals, and new employee F received $43,901 and $51,093. The Board's figures included two employees that had $22,866 and $29,503 in 1994; however, their inclusion would lower average figures and thereby reduce the Respondent's liability.

The Respondent shows that employees C, D, and E were "master" mechanics in the service department which gives them a greater billing ability and it urges that Carland's rate should be compared only with employee in the used car department where he had worked. Carland's salary history prior to 1994, showed that he regularly earned less than employees C, D, and E, but that he had increased his wages each year from 1992 to 1994.

The use of the averages of the six so-called comparable employees results in a calculated average weekly wage for Carland that is slightly less than his average for 1994, and it therefore would appear to compensate for the inclusion of "master" mechanics and mechanics with lesser earnings and its use would not result in any obvious windfall to Carland. Accordingly, I find that the gross backpay formula is reasonable and I accept the amounts set forth in amended schedule E as appropriate. As noted above, the Respondent otherwise has shown that Carland is not entitled to backpay (or expenses) for the period of his willful failure to seek employment or mitigate expenses and, accordingly I find that Carland is due a total net backpay, plus expenses as reflected in the following table:

| *Yr./Qtr.* | *No. of Weeks* | *Gross Backpay* | *Interim Earnings* | *Expenses* | *Net Backpay Plus Expenses* |
|---|---|---|---|---|---|
| 94/04 | 0.4 | $ 355.34 | | | $ 355.34 |
| 95/01 | 13 | 11,465.72 | | | 11,465.72 |
| 95/02 | 13 | 11,465,74 | | | 11,465.74 |
| 95/03 | 13 | 11,465.74 | $ 1,661.54 | $ 37.50 | 9,841.70 |
| 95/04 | 13 | 11,465.74 | 5,420.90 | | 6,044.84 |

| | | | | | |
|---|---|---|---|---|---|
| 96/01 | 13 | 11,149.60 | 6,209.22 | | 4,940.38 |
| 96/02 | 13 | 11,149.58 | 2,865.80 | 37.50 | 8,321.28 |
| 96/03 | 13 | 11,149.58 | 5,927.01 | 455.00 | 5,677.57 |
| 96/04 | 13 | 11,149.58 | 802.50 | 655.00 | 11,002.08 |
| Totals | | $90,816.62 | $22,886.97 | $1,185.00 | $69,114.65 |

In 1994, McClellan worked only 886 flat-rate hours and earned $17,276, where as Respondent's other transmission mechanic (Boomer) had 3153 flat-rate hours and earnings of $65,853. In 1992 and 1993, however, McClellan had basically worked full time with over 2000 hours in each year and respective earnings of $39,419 and $40,048 (Boomer was not employed by the Respondent during those years and the other transmission mechanics had fewer hours than McClellan and respective earnings of $29,944 and $17,338). During 1995 and 1996, Boomer had flat-rate hours in excess of 4000 and respective earnings of $83,329 and $77,612. In 1997, a newly hired transmission mechanic replaced Boomer and had over 2500 hours and earnings of $52,172. The General Counsel contends that conditions changed after McClellan was terminated and one employee, Boomer, did all the transmission work, which work had increased the first 2 years of the backpay period. The record clearly shows that Boomer was a highly skilled, aggressive worker who billed a high number of flat-rate hours and, in effect, accomplished the work of two more ordinary workers during 1995 and 1996. Accordingly, I agree with the Respondent that use of the average annual wage received by Boomer is not representative and the suggested average figures are not reasonable. There were typically two transmission mechanics while McClellan was at the Employer and it is unreasonable for McClellan to receive double the annual wages he made in his years with the Employer.

In 1993, McClellan had 2180 hours, almost as much as his peak year in 1992 and, under a best case scenario, he would have worked comparable hours with a second mechanic if he had remained with the employer (apparent available work for 1995 and 1996 total 4329 and 4635 flat-rate hours respectively). As the Respondent had fewer flat-rate transmission hours in 1997, and Boomer left, it is not unreasonable to conclude that if McClellan had still been employed he would have been more experienced and would have worked the same hours, 2887, as did the single-transmission mechanic who replaced Boomer and would have earned at the same level. Accordingly, and in view of McClellan's artificially reduced earnings[3] in 1994, I find that the use of McClellan's peak prior annual earnings in 1993 ($40,048) for computing his gross pay for 1995 and 1996 as one of two transmission mechanics and the actual wage level earned by the single mechanic in 1997 (and at the same rate for the first 2 weeks of 1998), would be reasonable and I conclude that the suggested gross backpay amounts must be revised to replaced the unreasonable amounts calculated under the General Counsel's compliance specifications, as reflected in the following table:

| *Yr./Qtr.* | *Gross Backpay* | *Interim Earnings* | *Net Backpay Plus Expenses* |
|---|---|---|---|
| 94/04 | $ 5,251.36 | | $ 5,251.36 |
| 95/01 | 10,012.00 | | 10,012.00 |
| 95/02 | 10,012.00 | $ 757.26 | 9,254.74 |
| 95/03 | 10,012.00 | 4,922.25 | 5,089.75 |
| 95/04 | 10,012.00 | 4,922.25 | 5,089.75 |
| 96/01 | 10,012.00 | 1,754.95 | 8,257.05 |
| 96/02 | 10,012.00 | 2,910.87 | 7,101.13 |
| 96/03 | 10,012.00 | 1,119.57 | 8,892.43 |
| 96/04 | | | |
| 97/01 | 13,841.55 | 4,250.00 | 9,591.55 |
| 97/02 | 13,841.55 | 4,250.00 | 9,591.55 |
| 97/03 | 13,841.55 | 4,250.00 | 9,591.55 |
| 97/04 | 13,841.55 | 4,250.00 | 9,591.55 |
| 98/01 | 2,003.30 | 613.46 | 1,389.84 |
| Totals | $132,704.85 | $34,000.61 | $98,704.24 |

I otherwise find that the Respondent has met its burden only to the extent discussed in the above conclusions and I conclude that discriminatees Carland and McClellan are entitled to receive the reasonable net backpay as recalculated and set forth herein.

## ORDER[4]

On the basis of the findings and conclusions set forth above and pursuant to Section 10(c) of the Act, it is ordered that the Respondent, its officers, agents, successors, and assigns, shall make whole each of the discriminatees by payment to each of them as follows:

Bruce Carland, $69,114.65 and Scott McClellan, $98,704.24; plus interest in accordance with *New Horizons for the Retarded,* 283 NLRB 1173 (1987), minus tax withholdings required by Federal[5] and state law.

[3] The IRS certified that McClellan failed to file returns for tax years 1994 through 1997, but its records did reflect W-2 forms.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] Because the record indicates that McClellan failed to make Federal income tax filings in 1994 through 1997, in accordance with *Hacienda Hotel & Casino,* 279 NLRB 601 fn. 4 (1986), a copy of this supplemental decision and Order shall be furnished to the Internal Revenue Service.